FILE COPY

FILED
MAY 5 19
CHARLES ELMORE CR
CLE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,

Petitioner,

vs.

MILTON E. GETZ,

Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

ALFRED SUTRO,
Standard Oil Building, San Francisco,
OSCAR LAWLER,
Standard Oil Building, Los Angeles,
FRANK D. MADISON,
Standard Oil Building, San Francisco,
EUGENE M. PRINCE,
Standard Oil Building, San Francisco,
Attorneys for Respondent.

Table of Contents

Page

Points of agreement between the majority and minority opinions (as understood by us) and the decisive question in the case: What was the rule of California law which entered into the statutory contract? 2

Though the decision of the Supreme Court of California in the case at bar, as to the effect and meaning of its own earlier decisions, is not conclusive of this court, yet it is an authority which this court under its own settled rule ought to follow, the question being one purely of state law, and the decision of the state court having, to say the least, a reasonable basis 4

The California cases decided before the time of the statutory contract, and which established the rule of law which entered into the contract, show that rule made no distinction, such as is made by the majority opinion, between statutory liabilities of a contractual nature, and other statutory liabilities 11

Conclusion 18

Table of Authorities Cited

Cases Cited

	Pages
Ames, Lectures on Legal History, p. 160	13
Berg v. Traeger, 210 Cal. 323, 292 Pac. 495	8
Bienville Water Supply Co. v. Mobile, 186 U. S. 212	6
Black v. Curran, 14 Wall. 463	17
Bouvier's Law Dictionary, Rawle's Third Revision, Vol. 3, p. 2781	13
Callet v. Alioto, 210 Cal. 65, 290 Pac. 438	7, 16
Crain v. Mallone, 130 Ky. 125, 113 S. W. 67	14
Doe v. Eslava, 9 How. 421	6
Ennis Water Works v. Ennis, 233 U. S. 652	11, 12
Jetton v. University of the South, 208 U. S. 489	6
Keener on Quasi-Contracts, pp. 1-25	13, 14
Krause v. Rarity, 210 Cal. 644, 293 Pac. 62	7
Long Sault Development Co. v. Call, 242 U. S. 272	6
Louisiana v. Pilsbury, 105 U. S. 278	17
Milwaukee Electric R. Co. v. Milwaukee, 252 U. S. 100	6
Moss v. Smith, 171 Cal. 777, 155 Pac. 90	2, 7, 14, 15, 16
Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322	2, 12, 13, 14
Pacific Gas and Electric Co. v. State of California, 82 Cal. Dec. 722, 6 P. (2d) 78	8, 9, 10
People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866	7, 16
Sioux City R. Co. v. Trust Co. of North America, 173 U. S. 99	4
Southern Wisconsin R. Co. v. Madison, 240 U. S. 457	4, 6
Steamship Co. v. Joliffe, 2 Wall. 450	13
Tampa Water Works v. Tampa, 199 U. S. 241	6
Tayloe v. Thomson, 5 Pet. 358	17
Theological Seminary v. Illinois, 188 U. S. 662	5
Troy Union R. Co. v. Mealy, 254 U. S. 47	5
United States v. Title Ins. Co., 265 U. S. 472	15
Warburton v. White, 176 U. S. 484	11, 12
Willcox v. Edwards, 162 Cal. 455, 123 Pac. 276	2, 7

Statutes Cited

Cal. Stats. 1889, p. 330	12
Cal. Stats. 1929, p. 891	9

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 528

PEIRCE COOMBES,
Petitioner,

vs.

MILTON E. GETZ,
Respondent.

RESPONDENT'S PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

As to the ruling with respect to the extent of the reserved power of amendment and repeal, we do not ask a rehearing, but we do respectfully ask a rehearing on the ruling that the California cases do not establish our contention that the California law, which existed at the time of the making of the "statutory contract" in this case, contemplated the extinction of this cause of action by

repeal of the constitutional provision from which it arose. This is a point which we did not brief or argue in this court, beyond a citation of some of the applicable California cases (Brief for Respondent, pp. 19-24), because nowhere in the petitioner's briefs was any argument made that the California cases failed to support, as a matter of state law, the rule to which the Supreme Court of California cited them. Indeed, *Moss v. Smith*, *Willcox v. Edwards* and *Napa State Hospital v. Flaherty*, the three cases discussed by the majority in this connection, are not even cited in any of the petitioner's briefs.

POINTS OF AGREEMENT BETWEEN THE MAJORITY AND MINORITY OPINIONS (AS UNDERSTOOD BY US) AND THE DECISIVE QUESTION IN THE CASE: WHAT WAS THE RULE OF CALIFORNIA LAW WHICH ENTERED INTO THE STATUTORY CONTRACT?

As we understand the opinions, the majority and minority agree as to the following propositions:

1. The rule of law in California at the time of the making of the statutory contract—that is to say, the law as it existed at the time petitioner's assignor extended credit to Getz Bros. & Company in 1923—is a part of that contract.

2. That rule, so entering into the statutory contract, is the rule as theretofore established by the Supreme Court of California.

3. If, under the preexisting California rule so entering into the statutory contract, such a right of action as is asserted by the petitioner in this suit was subject to extinction by repeal of the enactment from

which the right of action arose, then the decision of the Supreme Court of California is correct.

The decisive question in the case, therefore, and the question which the majority of this court decided differently from the Supreme Court of California is—What was the law of California on this subject at the time the statutory contract was made?

The Supreme Court of California dismissed the appeal to it in the case at bar on the authority of its own earlier decisions (R. p. 38). In so doing, it held, and its ruling has the approval of the minority of this court, that under the law of California as established by prior California cases, and as it existed at the moment of the making of the statutory contract in 1923, the repeal without a saving clause of any statute creating a liability unknown at common law extinguished all causes of action upon that liability which had not been reduced to final judgment (R. pp. 38-39). In reversing the case the majority of this court holds in effect that the Supreme Court of California decided the case on a wrong interpretation of its own earlier decisions; that the preexisting rule in California was not what that court conceived it to be, but was subject to an exception with regard to such statutory liabilities as were "contractual" rather than "penal." It is with respect to this determination that we ask a rehearing.

THOUGH THE DECISION OF THE SUPREME COURT OF CALIFORNIA IN THE CASE AT BAR, AS TO THE EFFECT AND MEANING OF ITS OWN EARLIER DECISIONS, IS NOT CONCLUSIVE OF THIS COURT, YET IT IS AN AUTHORITY WHICH THIS COURT UNDER ITS OWN SETTLED RULE OUGHT TO FOLLOW, THE QUESTION BEING ONE PURELY OF STATE LAW AND THE DECISION OF THE STATE COURT HAVING, TO SAY THE LEAST, A REASONABLE BASIS.

The determination by the highest court of a state as to the meaning and effect of its own prior decisions should in any case be most persuasive (*Sioux City R. Co. v. Trust Co. of North America*, 173 U. S. 99, 109). In this particular case it cannot be said that the Supreme Court of California was *certainly* and *undoubtedly* wrong in its ruling upon that subject; the fact that three dissenting members of this court agreed with the State Supreme Court proves that the matter is at least open to reasonable doubt. Under the settled rule of this court, as applied to the circumstances, we submit that the decision of the state court should not be disturbed; while it is not binding on this court, still, on grounds of judicial comity and persuasive force, we believe it ought to control.

In *Southern Wisconsin R. Co. v. Madison*, 240 U. S. 457, an impairment of contract case, this court said (p. 461):

> "Although we all agree that in this class of cases it is our duty to see that parties are not deprived of their constitutional rights under the guise of construction, still the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point."

In *Theological Seminary v. Illinois*, 188 U. S. 662, also an impairment of contract case, this court said:

"We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state" (p. 675).

* * * * * * *

"This is not such an unnatural, strained or unreasonable construction of the act as shows it to be erroneous, and while it might be otherwise construed so as to effect a total exemption, we are not prepared to hold that the state court so clearly erred as to call upon us to reverse its determination. We, therefore, adopt, though we admit with some hesitation, the views of the state court, which lead to an affirmance of the judgments" (p. 677).

In *Troy Union R. Co. v. Mealy*, 254 U. S. 47, likewise an impairment of contract case, this court said (pp. 49-50):

"The Court of Appeals held that the concession in the Act of 1853 was spontaneous and belonged to the class of *privilegia favorabilia*, as it is put in *Christ Church v. County of Philadelphia*, 24 How. 300, and therefore was subject to repeal. This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation."

Among many other cases to the same effect we cite the following:

Doe v. Eslava, 9 How. 421, 444 ("* * * as the State tribunals are presumed to do their duty, we should not disturb their decisions, even on matters connected with the general government, unless very manifestly improper or erroneous").

Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 220 ("At the same time, the opinion of the highest court of the state, even in contract cases, is entitled to most respectful consideration, and should not lightly be ignored").

Tampa Water Works v. Tampa, 199 U. S. 241, 243-244 (State court followed where question is "balanced with doubt" so that "It cannot be said that the interpretation adopted is not a possible one").

Jetton v. University of the South, 208 U. S. 489, 499 ("While * * * we form our own judgment as to the existence and construction of the alleged contract, and are not concluded by the construction which the state court has placed on the statute that forms such contract, yet we give to that construction the most respectful consideration and it will in general be followed, unless it seems to be plainly erroneous").

Long Sault Development Co. v. Call, 242 U. S. 272, 277;

Milwaukee Electric R. Co. v. Milwaukee, 252 U. S. 100, 103 (quoting *Southern Wisconsin R. Co. v. Madison*, supra).

We believe that in no one of the foregoing cases did the facts and circumstances, or the governing principles of judicial comity and reciprocal respect between national and state courts, make so strongly as in the case at bar against overturning the state decision.

As persuasive authorities in addition to the decision of the State Supreme Court in the case at bar, we cite the several other California cases, which were decided after the making of the statutory contract here involved, but in which the State Supreme Court clearly stated the effect of its earlier decisions. None of these cases were cited in our brief, because (as we thought we had good reason to suppose) the meaning of the California cases, as establishing a rule of state law, was not in dispute. In the following cases the court stated the rule (as it did in the present case) as being applicable to *all* statutory liabilities which were unknown at common law.

Callet v. Alioto (1930), 210 Cal. 65, 67, 290 Pac. 438 ("The justification for this rule is that *all statutory remedies* are pursued with full realization that the legislature may abolish the right to recover at any time. (Sec. 327, Pol. Code.) This rule only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law" (italics ours)).

Krause v. Rarity (1930), 210 Cal. 644, 652, 293 Pac. 62 ("By those cases [i. e., *Moss v. Smith, Willcox v. Edwards, People v. San Luis Obispo,* and others]

the rule obtaining elsewhere has become thoroughly established in the law of this state that when a right of action does not exist at common law, but depends solely upon a statute, the repeal of the statute destroys the right unless the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation").

Berg v. Traeger (1930), 210 Cal. 323, 325, 292 Pac. 495 ("* * * it is the general rule that a cause of action or remedy dependent on statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute").

In *Pacific Gas and Electric Co. v. State of California* (1931), 82 Cal. Dec. 722, 6 P. (2d) 78, *the State Supreme Court specifically decided that the rule was applicable to a contractual liability.* In that case the court said (6 P. (2d) 79):

> "The action, *based on an implied contract,* is one in which plaintiff seeks to recover from the state the sum of $23,995, paid under protest to the secretary of state for the privilege of filing a certificate of increase of plaintiff's capital stock from $100,000,000 to $400,000,000" (italics ours).

The court said in ruling on the attorney general's contention that the action abated by reason of the withdrawal of the statutory authority for its maintenance (6 P. (2d) 80):

> "* * * we recognize the rule relied on by the attorney general that the repeal of a statute takes away all remedies given by such statute, and defeats all actions pending under it at the time of the repeal, especially where the repealed statute creates a cause of action and provides a remedy not known to the common law, or confers jurisdiction where it did not previously exist (Freeman v. Glenn County Tel. Co., 184 Cal. 508, 194 Pac. 705; People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866; Ann. Cas. 1912B, 1148; 23 Cal. Jur. 714, sec. 97) * * *"

It is important to observe that the California court, with a contractual liability before it for consideration, made the foregoing statement of the rule on the authority of the earlier California cases which we cited to this court, and which the majority has declined to consider as authority for the exact principle to which the Supreme Court of California cited them.

In the *Pacific Gas & Electric* case the suit did not abate because of a very unusual set of facts. After it was commenced, the statutory authority for a suit against the state on an *implied* as distinguished from an *express* contract was withdrawn by an amendatory statute (Cal. Stats. 1929, p. 891). Because of this fact, the trial court held—and, as the Supreme Court of the state decided, *properly* held—that the cause of action was extinguished. The plaintiff appealed, and while the appeal was pending another statute restored the law to the

> "condition in which it was when this *action on implied contract* was commenced" (6 P. (2d) 80). (italics ours).

For this sole and specific reason the State Supreme Court held that the suit could proceed, saying (6 P. (2d) 80):

> *"Therefore, while the law justifies the sustaining of the demurrer upon this ground at the time the trial court ruled thereon,* it would seem that by reason of the 1931 amendment of section 688, supra, having intervened to again change the law in this regard, the cause should be decided according to the existing law which authorizes suits against the State *on such an implied contract as appellant has attempted to plead"* (italics ours).

The case at bar involves an *implied contract* founded on statute, the very kind of contract involved in the *Pacific Gas and Electric* case. The Supreme Court of California in that case gave to its own earlier decisions—decisions which entered into and were a part of the implied statutory contract in the case at bar—the precise effect and meaning which we claim for them in the case at bar. We respectfully submit that on every principle of comity established by this court, this highly persuasive decision, together with the other California decisions above cited, ought to be fully considered on a rehearing to the end that the decision of this court shall not give to the earlier California decisions a meaning diametrically opposed to that expressly given to them by the California court.

THE CALIFORNIA CASES DECIDED BEFORE THE TIME OF THE STATUTORY CONTRACT, AND WHICH ESTABLISHED THE RULE OF LAW WHICH ENTERED INTO THE CONTRACT, SHOW THAT RULE MADE NO DISTINCTION, SUCH AS IS MADE BY THE MAJORITY OPINION, BETWEEN STATUTORY LIABILITIES OF A CONTRACTUAL NATURE, AND OTHER STATUTORY LIABILITIES.

We have so far considered the California decisions rendered *after* the making of the statutory contract. We next respectfully ask the court's brief reconsideration of the California cases decided *before* the statutory contract, these being the cases establishing the rule of law which entered into and became a part of that contract. In this respect there is, as we understand it, a difference in the matter of authoritative force in this court between the California cases decided *before* and those decided *after* the making of the contract. In mentioning this difference, we recognize, and always have recognized, the principle reaffirmed in the majority opinion that this court, in determining the federal constitutional question, has to decide for itself whether there was a contract, what the contract was, and whether it has been impaired. But, in deciding what the contract was, the settled rule of this court as laid down in *Warburton v. White*, 176 U. S. 484, 495, *Ennis Water Works v. Ennis*, 233 U. S. 652, 657-658, and many other cases (Brief for Respondent, pp. 18-19), is that

> "* * * where we come to consider a contract arising from a state law or ordinance, we will treat it as if there was embodied in its text the settled rule of law which existed in the state at the time the state action relied upon as a contract was taken" (*Ennis Water Works v. Ennis*, supra).

This rule, we assume, is not called into question by the decision in the case at bar, because the *Ennis* and *Warburton* cases are cited with approval in the majority opinion. From this it follows that the California cases *antedating* the statutory contract are *binding* upon this court (not in their character of decisions as such, but) because the rule of law which they establish is a term of the statutory contract. As such it is a fact in the record from which, we submit, this court cannot depart any more than it can depart from any other fact or any other term of the contract.

The majority opinion discusses several of the earlier California cases in order to show that they did not involve statutory liabilities of a contractual nature. As to at least one of these cases, *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322, we very respectfully submit that the conclusion of the majority is wrong.

In that case a statute made certain close relatives liable for the support in state institutions of indigent insane persons (Cal. Stats. 1889, p. 330). The trustees of an insane asylum brought suit under the statute against a father for the support of an insane adult son. The court held that the action could not survive repeal of the statute without a saving clause. The majority opinion distinguishes this case on the ground that the statute contemplated and required no act of the relatives by way of assumption of liability and says: "No element of a contract was present."

But, if the corporate director in the case at bar, by the act of assuming his office, made (as the majority holds) a continuing offer to all concerned that he would discharge

the obligations imposed on him by law, in favor of creditors of the corporation, then similarly it could be said that the father in the *Napa Hospital* case, by assuming the status of father or potential father, made a like continuing offer to discharge all obligations imposed on him by law in favor of creditors of the son. Further, the majority's distinction does not take into account that, from the standpoint of the creditor, the party whose cause of action was taken away by the repeal of the statute in the *Napa Hospital* case, that case was closely comparable to the case at bar. In rendering support for the son, the insane asylum certainly *acted*, just as much as the petitioner's assignor in the case at bar acted in extending credit to Getz Bros. & Company.

It is, however, we believe not necessary to draw the analogy of a consensual contract in order to show that the *Napa Hospital* case involved a statutory liability of a contractual nature. The liability imposed by the statute in that case was, we submit, a typical example of quasi-contract. The term "quasi-contract," though often loosely used, to the confusion of the law, refers in its most nearly proper and best understood meaning to an obligation which is similar to one founded on a promise, but which in fact is imposed by law independently of express consent, or of any act implying consent (*Keener on Quasi-Contracts*, pp. 1-25; *Ames, Lectures on Legal History*, p. 160; *Bouvier's Law Dictionary*, Rawle's Third Revision, Vol. 3, p. 2781; *Steamship Co. v. Joliffe*, 2 Wall. 450, 457, a case cited in the majority opinion).

A standard example of quasi-contract is the obligation imposed by law upon a parent to support a child; the

very obligation imposed by the statute in the *Napa Hospital* case. As is said in *Keener on Quasi-Contracts* (p. 23):

> "On this ground must also be put the obligation of a father, where such obligation is imposed by law, to pay for necessaries furnished a child whom he has refused to support."

So far as the quasi-contractual nature of the liability is concerned, it obviously makes no difference whether the "obligation * * * imposed by law" is imposed by the common law—as it would be with respect to an infant son—or by statute, as it was with respect to the adult son in the *Napa Hospital* case. As was pertinently remarked by the court in *Crain v. Mallone,* 130 Ky. 125, 113 S. W. 67, 68:

> "The duty and obligation of a parent to care for his offspring does not necessarily terminate when the child arrives at age or becomes an adult; nor is it limited to infants and children of tender years. An adult child may from accident or disease be as helpless and incapable of making his support as an infant, and we see no difference in principle between the duty imposed upon the parent to support the infant and the obligation to care for the adult, who is equally, if not more, dependent upon the parent."

In *Moss v. Smith,* 171 Cal. 777, 155 Pac. 90, another one of the cases discussed by the majority, it is true that the statute imposing directors' liability was said to be penal. The state court, however, determined that with respect to the point under consideration it made no difference whether the statute was penal or remedial (171 Cal.

pp. 782, 788). The majority refuses to give any authoritative effect to this statement, saying "In any event, the *liability* was not held to be contractual" (our italics). This, we submit, does not meet the state court's ruling; the word "remedial" was used by the state court with reference to the statute (171 Cal. 782, 788), whereas the word "contractual" is used by the majority of this court to describe the liability under the statute. It cannot be said, we submit, that there is anything in *Moss v. Smith* making the rule of that case inapplicable to the liability of a contractual nature founded on a remedial statute, which is the present case. The determination made in *Moss v. Smith* with respect to non-penal liabilities was not mere *obiter dictum*, as the majority opinion seems to imply. Where a decision is placed on two grounds, neither is *dictum*. In *United States v. Title Ins. Co.*, 265 U. S. 472, this court said (p. 486):

> "But it is urged that what we have described as ruled there was *obiter dictum* and should be disregarded, because the Court there gave a second ground for its decision which was broad enough to sustain it independently of the first ground.' The premise of the contention is right but the conclusion is wrong; for where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' *Union Pacific R. R. Co. v. Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160, 166; *Railroad Companies v. Schutte*, 103 U. S. 118, 143."

The California cases have many times stated the rule, as to the extinction of statutory liability by repeal, as

being applicable to statutes *"conferring civil rights or powers"* as distinguished from penalties of crimes (*People v. Bank of San Luis Obispo* (1910), 159 Cal. 65, 79, 112 Pac. 866, quoted infra), and as being applicable to *"all statutory remedies"* (*Callet v. Alioto*, 210 Cal. 65, 67, 290 Pac. 438). The test uniformly given by the Supreme Court of California for determining the application of the rule has always been the one question: Did the liability exist at common law? As stated in *Moss v. Smith*, supra (171 Cal. 788):

> "'Courts are not required to adopt the theory that these statutes are penal, to justify the holdings that the repeal of such a statute without reservation destroys any unenforced rights of a creditor. Such holdings can be justified on the equally sound doctrine that the repeal of a statute which gives a cause of action destroys the right and any pending action based on such statute is abated by such repeal.' Therefore it is that we say that it does not become of vital consequence in this consideration whether the statute be viewed as penal or remedial. The principle is that declared in *Curran v. Owens*, 15 W. Va. 208, in the following language: 'A right of action which does not exist at common law but depends solely upon statute falls with a repeal of the statute, without a saving clause, unless that right has been carried into judgment.'"

To add but one more quotation (*People v. Bank of San Luis Obispo* (1910), 159 Cal. 65, 112 Pac. 866):

> "'As a general rule, the repeal of a statute without any reservation takes away all remedies given by the repealed statute and defeats all actions pending under it at the time of its repeal. The rule is especially

applicable to the repeal of statutes creating a cause of action and providing a remedy not known to the common law * * *'" (p. 67).

"In the case of penalties and crimes, the repeal operates to defeat all actions pending. *In case of a statute conferring civil rights or powers,* the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected" (p. 79) (italics ours).

Such cases, to say the least, establish a principle of law applicable in the State of California. There is, we submit, no reason to suppose that the parties to the statutory contract in the case at bar understood this principle in any sense different from that in which the Supreme Court of California had repeatedly stated it. It is, therefore, in that sense that the principle should, as we contend, be applied as part of the statutory contract (*Louisiana v. Pilsbury,* 105 U. S. 278, 290-295, and cases at pages 18-19 of Brief for Respondent). An established principle is part of the state law, even where there is no decision on analogous facts (*Tayloe v. Thomson,* 5 Pet. 358, 368-369; *Black v. Curran,* 14 Wall. 463, 469). In the case last cited this court said regarding the decisions of the Supreme Court of Illinois (14 Wall. 469):

"Although the exact point in dispute has not been adjudicated by that court, yet certain general principles have been announced which in their application to this case we think relieve it of difficulty."

CONCLUSION.

Underlying the majority opinion appears to be the thought of apparent injustice resulting from permitting the repeal to take away the petitioner's accrued cause of action. We respectfully submit that such supposed injustice is only apparent, not real; the justice of the case we believe is clearly with the respondent. In the natural course of business affairs, it is not reasonable to suppose that petitioner's assignor had the slightest thought of directors' liability when he gave credit to Getz Bros. & Company to the amount of $617.50 for goods sold and delivered (R. p. 1). The contingency that an officer might embezzle corporate funds for which some director might be held liable, was too remote to have affected the credit risk in that kind of an every-day transaction. Considering the realities of the situation, we submit that the extinguishment of the liability by the repeal would do no more than relieve the director of an unjust liability. That the liability—by which an innocent man, guiltless of the least fault or negligence, could be ruined, as witness this very case, in which the recovery sought exceeds $500,000.00—is unjust, is not a matter of argument; it is a fact established by the action of the people of the State of California in repealing the law which created the liability. The Supreme Court of California has held that, in adopting the repeal without a saving clause, the people made "conclusively manifest" (210 Cal. 654) their intention to destroy the repealed measure as to existing liabilities as well as to future liabilities. We submit that the action of the people of the state was not unjust, and that the decision of the Supreme Court of California was right.

In any event, we submit the question is open to reasonable doubt, so that this court, under well settled principles, should not overrule the state court upon the pure question of state law on which this case in its ultimate analysis depends.

We submit this petition with a full realization of the vast burden of work which this court has to perform and with a respectful reluctance to add to that burden by asking a reconsideration of a point that has been decided. We sincerely believe, however, that this is a case in which there should be a rehearing, first, in fairness to the Supreme Court of the State of California; second, because of the importance to many people in the State of California of the question decided; and third, in justice to the respondent.

Dated, San Francisco,
April 29, 1932.

Respectfully submitted,

ALFRED SUTRO,
OSCAR LAWLER,
FRANK D. MADISON,
EUGENE M. PRINCE,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay; and in our opinion is well founded in point of law.

Dated, San Francisco,
April 29, 1932.

ALFRED SUTRO,
OSCAR LAWLER,
FRANK D. MADISON,
EUGENE M. PRINCE,
Attorneys for Respondent.